Supreme Court, U.S.
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No. 94- ___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

Arkansas Wildlife Federation,
Petitioner,

v.

ICI Americas, Inc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Arkansas' administrative penalty order bars plaintiff's claims for injunctive and declaratory relief in a citizen suit under the Federal Water Pollution Control Act, even though the plain language of that Act provides that such an order only precludes a "civil penalty action."

2. Whether Arkansas' administrative penalty order bars plaintiff's claims for civil penalties in a citizen suit under that Act, even though the plain language of the statute provides that such an order has no preclusive effect where, as here, a state's procedures for public participation and penalty assessment are not "comparable" to mandatory federal procedures prescribed by Congress for imposing administrative penalties under that Act.

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OPINIONS BELOW

The opinion of the court of appeals (App., 1a-15a) is reported at 29 F.3d 376 (8th Cir. 1994). The opinion of the district court (App., 17a-37a) is reported at 842 F. Supp. 1140 (E.D. Ark. 1993).

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1994 (App. 2a). The court of appeals denied a timely petition for rehearing on August 12, 1994 (App. 16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 505(a) of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1365(a), provides in pertinent part as follows:

> Except as provided in subsection (b) of this section, and section 309(g)(6) any citizen may commence a civil action on his own behalf--
>
> (1) against any person *** who is alleged to be in violation of (A) an effluent standard or limitation under this Act ***.
>
> The district courts shall have jurisdiction *** to enforce such an effluent standard or limitation *** and to apply appropriate civil penalties under section 309(d) of this Act.

Sections 309(g)(1), (g)(3), (g)(4), and (g)(6) of the FWPCA, 33 U.S.C. §§ 1319(g)(1), (g)(3), (g)(4), and (g)(6), provide in pertinent part as follows:

> (1) VIOLATIONS.--Whenever on the basis of any information available--
>
> (A) the Administrator [of EPA] finds that any person has violated *** any permit condition

*** in a permit issued under section 402 of this Act ***
the Administrator *** may *** assess a class I civil penalty or class II civil penalty under this subsection.

(3) DETERMINING AMOUNT.--In determining the amount of any penalty assessed under this subsection, the Administrator *** shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

(4) RIGHTS OF INTERESTED PERSONS.--

(A) PUBLIC NOTICE.--Before issuing an order assessing a civil penalty under this subsection the Administrator *** shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(6) EFFECT OF ORDER.--

(A) LIMITATION OF ACTIONS UNDER OTHER SECTIONS.--Action taken by the Administrator *** under this subsection shall not affect or limit the Administrator's *** authority to enforce any provision of this Act; except that any violation--

(i) with respect to which the Administrator *** has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator *** or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,
shall not be the subject of a civil penalty action under subsection (d) of this subsection or section 311(b) or section 505 of this Act.

STATEMENT OF THE CASE

The Arkansas Wildlife Federation (AWF)[1] brought this action against I.C.I. Americas, Inc. (ICI) under the citizen suit provision of the FWPCA, 33 U.S.C. § 1365. AWF alleged that ICI was violating its National Pollutant Discharge Elimination System (NPDES) permit. The courts below held that AWF's suit was precluded under section 309(g)(6) of the FWPCA because of administrative enforcement action that the Arkansas Department of Pollution Control & Ecology (PC&E) had taken against ICI. The history of that action is recounted below.

PC&E issued an NPDES permit to ICI in September 1988. ICI violated its permit in 35 of the 44 months from November 1988 through June 1992. In February 1991, PC&E sent ICI a letter warning of possible enforcement action and requesting a meeting. When PC&E and ICI met in March 1991, ICI presented a plan to correct its violations by December 31, 1991. In April 1991, PC&E and ICI entered into a "consent administrative order" (CAO) in which ICI agreed to pay a $1,000 penalty and carry out its plan for corrective action. The CAO by its terms only covered 30 permit violations that had occurred between January 1990 and January

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[1]AWF has no parent companies or subsidiaries.

1991, and took no action as to earlier permit violations.[2] PC&E provided no public notice or opportunity to comment on the CAO before it was issued.

On July 2, 1991, AWF sent ICI a 60-day notice letter which stated that AWF intended to file a citizen suit under the FWPCA. In addition to the 30 violations covered by the CAO, AWF's notice included 25 violations that occurred in 1988 and 1989 that were not covered by the CAO.

In response to AWF's notice letter, ICI asked PC&E to issue a "corrected" CAO which would cover all of its past permit violations. In September 1991, PC&E and ICI entered into a new "corrected" CAO that covered all violations since November 1988.[3] However, the amount of the penalty was not increased. Again, PC&E provided no public notice or opportunity to comment on this action. In October 1991, after the required 60-day notice period had elapsed, AWF filed its complaint seeking penalties and declaratory and injunctive relief.

ICI did not meet the deadline in its compliance plan and continued to violate its permit. In December 1991, at ICI's request, PC&E granted ICI an extension of its compliance date to April 30, 1992, in exchange for an additional penalty of $500. ICI continued to violate its permit. In April 1992, at ICI's request, PC&E granted a second extension, to December 1992, for another $500 penalty.

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[2]The 30 violations included repeated and significant violations of the permit limits for chemical oxygen demand (11 violations, with the highest value more than three times the permit limit); total suspended solids (five violations, highest value six times the permit limit); and zinc (10 violations, highest value almost three times the permit limit). Zinc is classified by EPA as a toxic pollutant. 40 C.F.R. § 401.15.

[3]While ICI argued below that this "correction" merely carried out the intent of the parties at the time the first CAO was issued in April 1991, the "corrected" CAO listed violations that occurred in May and June 1991, *after* the date of the first CAO.

Again, ICI continued to violate its permit. Finally, in January 1993, at ICI's request, PC&E agreed to a third amendment to the CAO which imposed another $500 penalty, waived the requirement for ICI to comply with the previously applicable discharge limits for zinc in its permit, waived some monitoring and reporting requirements, and waived penalties for any future zinc violations. There was no public notice or opportunity for public comment on any of these actions by PC&E.

In determining the penalty amounts in the original, corrected, and amended CAOs, which totalled $2500, PC&E did not request ICI to provide information on, and did not consider, the economic benefit to ICI from its delayed permit compliance. App. 41a-42a, 44a-45a. According to an unrebutted affidavit from AWF's economic expert, the economic benefit to ICI from its delayed noncompliance was $181,023. This figure represents the amount of money ICI was able to earn during its period of noncompliance by delaying its expenditures on pollution control.

In determining the penalty amounts in the original, corrected, and amended CAOs, PC&E also did not consider ICI's ability to pay a penalty. App. 44a. ICI's parent is one of the world's 50 largest corporations, with annual U.S. sales of $5 billion and annual worldwide sales of $25 billion.

On these facts, ICI moved for summary judgment on the ground that under section 309(g)(6) of the FWPCA, PC&E's CAOs barred AWF's suit. That section precludes citizen suits for violations "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to [section 309(g)]." 33 U.S.C. § 1319(g)(6). AWF opposed ICI's motion and filed cross-motions for summary judgment and for declaratory and injunctive relief.[4] In April 1993, the district court

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[4]In its motion for summary judgment, AWF identified 111 violations of discharge limits and 17 violations of the monitoring and reporting requirements in ICI's permit between November 1, 1988 and June 15, 1992. ICI violated its

granted ICI's motion for summary judgment, dismissed AWF's cross-motions as moot, and dismissed AWF's complaint. The district court held that AWF's action was jurisdictionally barred under section 309(g)(6). The district court further held that the jurisdictional bar applied to all of ICI's past permit violations and covered claims for declaratory and injunctive relief, as well as civil penalties, even though the statutory bar is expressly limited to actions for "civil penalties." App. 20a-36a. AWF appealed.

On appeal, the United States filed an *amicus* brief supporting AWF's position that its citizen suit was not barred under section 309(g)(6). In its brief, the United States asserted a "direct interest in the development of the law regarding citizen enforcement of the Act." The United States noted that "Congress has charged the Administrator of the Environmental Protection Agency ('EPA') with ultimate responsibility for enforcement of the Act."

The United States recognized that an erroneous interpretation of section 309(g)(6) would limit its enforcement authority. That section states that if the conditions for preclusion are met as to a particular violation, that violation "shall not be the subject of a civil penalty action under subsection (d) of this section or section 311(b) or section 505 of this title." 33 U.S.C. § 1319(g)(6). This language therefore treats EPA enforcement

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discharge limits for zinc 47 times, for chemical oxygen demand 39 times, for total suspended solids 18 times, for oil and grease 4 times, for pH 2 times, and for phenol 1 time. ICI also failed to sample its discharges with the frequency required by its permit and failed to report all of its violations on its monitoring reports. Under the Act, each of these violations is subject to a civil penalty of up to $25,000 per day for each violation. 33 U.S.C. § 1319(d). In its motion for declaratory relief, AWF sought a declaratory judgment that the third amendment to the CAO did not comply with required procedures for NPDES permit modifications, including public notice and comment (40 C.F.R. §§ 122.62, 122.63, and 124.10), and that ICI therefore had a continuing duty to monitor and report its discharges. In its motion for injunctive relief, AWF sought an injunction requiring ICI to comply with all terms and conditions of its permit.

actions under sections 309(d) and 311(b) and citizen enforcement actions under section 505 the same way in terms of preclusion by state administrative penalty orders. Consequently, overbroad interpretations of that preclusion provision will unduly limit the authority of both citizens and EPA to enforce the Act.

The United States argued in its *amicus* brief that PC&E's penalty orders did not meet the conditions for preclusion in section 309(g)(6). It contended that those orders could not bar AWF's civil penalty claims, because Arkansas procedures for assessing penalties were not "comparable" to EPA's procedures and because the orders were not "diligently prosecuted." U.S. Br. 6-15. EPA procedures, as set forth in section 309(g)(4), require it to provide public notice and opportunity for public comment on proposed penalty orders. Arkansas did not provide any public notice or opportunity for public comment before issuing any of its penalty orders against ICI. EPA procedures, as set forth in section 309(g)(3), require it to consider a number of factors in determining administrative penalties, including economic benefit and ability to pay. Arkansas did not consider either of these factors when it imposed penalties on ICI.

The United States also argued that even if AWF's claims for civil penalties were precluded, AWF's claims for injunctive and declaratory relief were not. U.S. Br. 15-17. It stated that this conclusion was supported by the plain language of the statute and its legislative history and that "there can be no serious question that the district court's reading of it was in error." *Id.* at 16.

The court of appeals nevertheless affirmed the district court's decision. It held that AWF's civil penalty claim was barred on the ground that PC&E had commenced and was diligently prosecuting an administrative penalty action against ICI pursuant to a state statute comparable to section 309(g)(6). App. 6a-12a. The court of appeals also held that AWF could not pursue its claims for injunctive and declaratory relief. App. 12a-14a. Although it recognized that section 309(g)(6) merely applies to

"civil penalty actions," it disregarded this statutory language on the ground that it would be "unreasonable" to bar civil penalty claims without also barring the entire action. App. 13a-14a.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Decision Is In Direct Conflict with Supreme Court Precedent.

The decision below is in direct conflict with Supreme Court precedents concerning the interpretation of federal statutes. Under those precedents, "[i]f the intent of Congress is clear from the plain meaning of the statutory provision, that will be the end of the judicial inquiry." *Chevron U.S.A, Inc. v. NRDC,* 467 U.S. 837, 843 (1984).

AWF sought declaratory and injunctive relief in its complaint and by motion. Section 309(g)(6) simply does not bar such relief under any circumstances. The plain language of that section merely states that a violation which is the subject of government enforcement "shall not be the subject of a *civil penalty* action." 33 U.S.C. § 1319(g)(6)(A)(emphasis added). It is axiomatic that an action for declaratory and injunctive relief is not a "civil penalty action."[5]

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[5]The Conference Report on the bill that added Section 309(g)(6) in 1987 confirms that Congress intended only to bar actions for civil penalties, not actions for declaratory and injunctive relief:

> This limitation applies *only to an action for civil penalties* for the same violations which are the subject of the administrative civil penalties proceeding. * * * [T]his limitation would not apply to: (1) an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment) * * *.

H. Rep. No. 1004, 99th Cong., 2d Sess. 133 (1986)(emphasis added). Thus, even if the plain language of the statute were not conclusive, the legislative history leaves no doubt that Congress meant exactly what it said.

The court of appeals recognized that Section 309(g)(6) "makes no mention of whether a citizen could * * * bring an action for declaratory or injunctive relief." App. 13a. Nevetheless, the court held that AWF's claims for such relief were barred. In the Eighth Circuit's view, permitting AWF to pursue its equitable claims would be "unreasonable," because it "could result in undue interference with, or unnecessary duplication of the legitimate efforts of the state agency." App. 14a. Thus, the court of appeals chose to disregard the statute's plain meaning--and thus the enforcement policy chosen by Congress--in favor of a policy that it deemed more reasonable.

This approach is flatly inconsistent with basic principles of statutory construction. As this Court stated in *Commissioner of Internal Revenue v. Asphalt Products Co., Inc.*, 482 U.S. 117, 121 (1987) (summary reversal):

> Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided.

The Eighth Circuit's use of an "unreasonableness" standard of its own devise to override the plain language of a statute is in direct conflict with this principle.

The Eighth Circuit also overrode the plain statutory language when it held that Arkansas' administrative penalty orders in this case met the "diligent prosecution" and "comparability" requirements of Section 309(g)(6). Under that section, a citizen's claim for civil penalties is precluded only if a state has commenced and "is *diligently prosecuting* an action under a State law *comparable* to *this subsection.*" 33 U.S.C. § 1319(g)(6)(A)(ii) (emphasis added). The words "this subsection" refer to subsection (g) of Section 309. In subsection (g), Congress required EPA to follow very detailed and specific procedures when it issues an administrative penalty order.

In subsection (g)(4), Congress directed that EPA must provide public notice and opportunity for comment on *proposed* EPA penalty orders *before* those orders are issued in final form:

> *Before* issuing an order asssessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, *shall* provide public notice of and reasonable opportunity to comment on the *proposed* issuance of such order.

33 U.S.C. § 1319(g)(4) (emphasis added). However, at the time the CAOs were issued, Arkansas law did not contain "comparable" public participation requirements.[6] It is undisputed that Arkansas did not provide *any* public notice or opportunity to comment before issuing the orders in this case. App. 47a.[7]

The court of appeals nonetheless held that Arkansas law is comparable to subsection (g)(4) because, in its view, citizen intervention to challenge an order *after* it is issued in final form is comparable to commenting on a proposed order *before* it is finalized. App. 11a-12a. This holding rewrites the statute, effectively substituting "after" for "before" and "final" for "proposed."

Diligence must also be measured in terms of the specific penalty factors that Congress set out in subsection (g)(3):

> In determining the amount of any penalty assessed under

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[6]In 1993, after the CAOs in this case were issued, Arkansas amended its law to require public notice and comment on proposed penalties in its CAOs. Ark. Code Ann. § 8-4-103(d)(Michie 1993).

[7]AWF submitted an affidavit by PC&E's legal counsel in which he stated that PC&E's procedure is that "[n]o notice is given to the public of the proposed CAO, nor is there a public comment period, either before or after the entry of the CAO." App. 47a.

> this subsection, [EPA] * * * *shall take into account* the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, *ability to pay*, any prior history of such violations, the degree of culpability, *economic benefit or savings (if any) resulting from the violation*, and such other matters as justice may require.

33 U.S.C. § 1319(g)(3) (emphasis added).

The record in this case clearly shows that Arkansas did not even consider two of these factors when it assessed $2500 in penalties against ICI: ICI's "economic benefit" from its delayed compliance, and ICI's "ability to pay" a penalty. App. 41a-42a, 44a-45a. Consideration of these mandatory factors would undoubtedly have resulted in much higher penalties. AWF's unrebutted expert affidavit showed that ICI's economic benefit from its noncompliance was over $180,000 -- 72 times greater than the penalty that was imposed. In addition, ICI is able to pay a much higher penalty, because it is one of the world's largest corporations with annual U.S. revenues of $5 billion.

The state's failure even to consider two of the statutory penalty factors that Congress *required* EPA to evaluate when making its penalty determinations is proof of a lack of diligence. It would make no sense for Congress to, on the one hand, require EPA to consider certain factors yet, at the same time, authorize state enforcement agencies to ignore those same factors. The Eighth Circuit's theory was that "[i]t would be unreasonable and inappropriate to find failure to diligently prosecute simply because ICI prevailed in some fashion or because a compromise was reached." App. 9a. However, the defect with the state's prosecution in this case is much more serious. If states can ignore the statutory penalty factors and courts nevertheless approve those actions, the language requiring consideration of those factors is effectively deleted from the statute.

The Eighth Circuit therefore ignored the plain meaning of Section 309(g)(6) in two respects. It is plain that that section *never* bars citizen claims for injunctive or declaratory relief. It is also plain that section 309(g)(6) does not bar claims for civil penalties where, as here, a state's procedures for public participation and penalty assessment are demonstrably inconsistent with the mandatory federal procedures specifically set forth in that same section.

II. The Court of Appeals' Decision Exacerbates the Existing Split of Authority in the Courts.

The decision below exacerbates a conflict in the lower courts concerning the proper interpretation of section 309(g)(6). Three courts of appeals and at least 23 district court decisions have considered whether government administrative orders satisfy the conditions for preclusion under section 309(g)(6). Two conflicting lines of authority have developed.

One line of authority follows the plain language of the statute to determine whether a citizen suit is precluded. This line is exemplified by the Ninth Circuit's decision in *Washington PIRG v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993), in which the court decided that a citizen suit was not precluded by a prior EPA administrative order under section 309(a) that ordered compliance but imposed no penalties. The court relied on the plain language of section 309(g)(6)(A), which makes preclusion dependent on pursuit of a penalty "under this subsection," thereby referring only to EPA penalty orders under subsection (g), not EPA compliance orders under subsection (a). The Ninth Circuit rejected the defendant's argument that the court should look beyond the plain language of the statute and embrace a general policy that citizens can sue only when government has not taken any enforcement action. The court stated that it was bound by the clear statutory language, "not a court's sense of the general role of citizen suits in the enforcement of the Act." *Id.* at 886.

The other line of authority has gone beyond the plain language of the statute to preclude citizen suits whenever there is duplication between citizen and government actions. This line is exemplified by the First Circuit's decision in *North and South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991). The First Circuit's analysis started not with the language of Section 309(g)(6), but with the premise that "[t]he primary function of *** citizen suits is to enable private parties to assist in enforcement efforts where Federal and State authorities appear unwilling to act." *Id.* at 555. The court then "[p]resum[ed]" that, when those authorities are willing to act, "the need for citizen's suits vanishes." *Id.* From this premise, the court dismissed a citizen suit because the state had issued a prior administrative compliance order, even though the order was issued without public notice and opportunity for comment and did not impose any penalties. *Id.* at 556, n.7. The court also dismissed the citizens' claim for injunctive relief, on the ground that adherence to the plain statutory language--which would have barred the penalty claims but allowed the declaratory and injunctive relief claims to go forward--led to an "absurd" result. *Id.* at 557-58.

Decisions by other courts are readily classifiable into these two categories. Courts following the plain language have found no preclusion in 16 decisions because state procedures did not allow comparable public notice and comment,[8] claims for injunctive relief

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[8] *Save our Bays and Beaches v. City and County of Honolulu*, Civ. No. 92-00263 (D. Hawaii, July 27, 1994); *Tennessee Environmental Council v. Dana Corp.*, Civ. No. 1:92-0074 (M.D. Tenn. Jan. 4, 1994); *NRDC v. Vygen Corp.*, 803 F. Supp. 97, 101-02 (N.D. Ohio 1992); *PIRG v. New Jersey Expressway Authority*, 822 F. Supp. 174, 183-84 (D.N.J. 1992); *PIRG v. GAF Corp.*, 770 F. Supp. 943, 951 (D.N.J. 1991); *Pennsylvania Environmental Defense Foundation v. Mount Pocono Municipal Authority*, Civil No. 90-1208 (M.D. Pa., May 14, 1991); *Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc.*, 735 F. Supp. 1404, 1415-16 (N.D. Ind. 1990).

were raised,[9] and/or the EPA or state orders imposed no penalties.[10] On the other hand, courts following the *Scituate* theory have found preclusion in 10 decisions even though state procedures did not allow comparable public notice and comment,[11] claims for injunctive relief were raised,[12] and/or the state orders imposed no penalties.[13] The Eighth Circuit's decision below cited and relied on the *Scituate* decision. App. 9a, 11a-14a.

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[9]*Orange Environment, Inc. v. County of Orange*, No. 91-8688 (GLG), 1994 WL 45909 (S.D.N.Y. Aug. 22, 1994); *Coalition for a Liveable West Side, Inc. v. NYC Dept. of Environmental Protection*, 830 F. Supp. 194, 196-97 (S.D.N.Y. 1993); *New York Coastal Fishermen's Association v. New York City Department of Sanitation*, 772 F. Supp. 162, 169 (S.D.N.Y. 1991); *PIRG v. Witco Chemical Corp.*, 31 Env't Rep. Cases (BNA) 1571, 1576 (D.N.J. 1990).

[10]*Citizens for a Better Environment-California v. Union Oil Co. of California*, No. C94-0712 TEH (N.D. Cal., July 8, 1994); *Washington PIRG v. Pendleton Woolen Mills, supra*, 11 F.3d at 885; *PIRG v. New Jersey Expressway Authority, supra*, 822 F. Supp. at 184; *Arkansas Wildlife Federation v. Bekaert Corp.*, 791 F. Supp. 769, 775 (W.D. Ark. 1992); *NRDC v. Fina Oil & Chemical Co.*, 806 F. Supp. 145, 146 (E.D. Tex. 1992); *SPIRG v. P.D. Oil & Chemical Storage, Inc.*, Civ. No. 84-340A (D.N.J., Oct. 28, 1988).

[11]*Scituate, supra*, 949 F.2d at 556, n. 7; *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 842 F. Supp. 1140, 1145-47 (E.D. Ark. 1993), *aff'd*, 29 F.3d 376 (8th Cir. 1994); *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428, 1435-36 (D. Colo. 1993)(*"Colorado Refining I"*); *Saboe v. State of Oregon*, 819 F. Supp. 914, 917-18 (D. Ore. 1993). *See also Sierra Club v. Port Townsend Paper Corp.*, 28 Env't Rep. Cases (BNA) 1676, 1679-80 (W.D. Wash. 1988).

[12]*Scituate, supra*, 949 F.2d at 557-58; *ICI, supra*, 29 F.3d at 382-83.

[13]*Scituate, supra*, 949 F.2d at 555-56; *Sierra Club v. Colorado Refining Co.*, 852 F. Supp. 1476, 1481-83 (D. Colo. 1994)(*"Colorado Refining II"*); *Pape v. Menominee Paper Co.*, No. 2:93-CV-236, 1994 U.S. Dist. LEXIS 10277 (W.D. Mich., May 6, 1994); *Connecticut Coastal Fisherman's Association v. Remington Arms Co., Inc.*, 777 F. Supp. 173, 181-82 (D. Conn. 1991), *aff'd on other grounds*, 989 F.2d 1305 (2d Cir. 1993); *New York Coastal Fishermen's Association v. New York City Department of Sanitation, supra*, 772 F. Supp. at 165; *Atlantic States Legal Foundation v. Tyson Foods*, 682 F. Supp. 1186, 1187-89 (D. Ala. 1988).

A major source of this conflict in the lower courts arises from varying interpretations of language in this Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). While the issue in that case was completely different, the Court made several statements in *dicta* that *Scituate* and its progeny have interpreted as a rule of preclusion that is broader than the rule that Congress set forth in section 309(g)(6).

In *Gwaltney*, the Court decided that section 505 of the FWPCA, which authorizes citizens to sue persons "alleged to be in violation" of their NPDES permits, does not permit citizen suits for wholly past violations -- that is, violations which occurred entirely before the complaint was filed.[14] The Court did not consider the effect of parallel government enforcement actions. Neither EPA nor the state had taken any enforcement action in that case. Section 309(g) was not even mentioned, let alone discussed or analyzed, in the Court's opinion.

Nevertheless, in reaching its decision, the Court made several statements in *dicta* on preclusion which suggest a narrow role for citizen enforcement. Those statements have become a major source of the conflicting interpretations of section 309(g)(6) by the lower courts.

First, the Court stated that the structure of the citizen suit provision "suggests that the citizen suit is meant to supplement rather than supplant governmental action" and is proper "if the Federal, state and local agencies fail to exercise their enforcement responsibility." 484 U.S. at 60. Second, the Court stated that giving citizens and government the same authority to sue for wholly past violations "would change the nature of citizens' roles from interstitial to potentially intrusive." *Id.* at 61. Some courts, including *Scituate* and the court below, have read these statements broadly to imply that citizens compete with government enforcers

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[14]In the present case, ICI continued violating its permit after AWF's complaint was filed, so the district court had jurisdiction under the *Gwaltney* test.

for the same public remedy and that any duplication between citizen and government enforcement is impermissible.[15] These courts conclude that, if the government has fulfilled its primary role and taken enforcement action, citizens have no role left to play.

This simplistic argument misinterprets *Gwaltney*. This Court's statement was merely a general description of the Congressional scheme, not an invitation to rewrite it. Unquestionably, citizen suits do "supplement," i.e., "add to," agency enforcement. Citizens can supplement agency enforcement by commencing suits whenever the specific preclusion rules are not met. Furthermore, citizen suits cannot "supplant," i.e., "supersede," agency enforcement. EPA and the states always have the ultimate power to block or limit a citizen suit by taking several types of judicial and administrative action.[16] However, it is far too great a conceptual leap to use this Court's "suggestion" as a finding that Congress intended to bar citizen suits whenever a government

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[15]The courts have quoted and relied on the "supplement or supplant" phrase in nine decisions in which preclusion was found. *Scituate, supra*, 949 F.2d at 555, 558; *ICI, supra*, 842 F. Supp. at 1147; *Colorado Refining I, supra*, 838 F. Supp. at 1436; *Colorado Refining II, supra*, 852 F. Supp. at 1483; *Pape, supra*, 1994 U.S. Dist. LEXIS 10277, *8; *Saboe, supra*, 819 F. Supp. at 918-19; *Remington Arms, supra*, 777 F. Supp. at 180; *New York Coastal Fishermen, supra*, 772 F. Supp. at 165. The courts have also quoted and relied on the "interstitial to potentially intrusive" phrase. *ICI, supra*, 29 F.3d at 380; *Tyson, supra*, 682 F. Supp. at 1189.

[16]EPA or a state can completely block a citizen suit by filing a prior lawsuit. 33 U.S.C. § 1365(b). They can preclude a civil penalty claim by commencing an administrative penalty action before the citizen's notice letter is sent. 33 U.S.C. § 1319(g)(6). EPA has an absolute right to intervene in any citizen suit. 33 U.S.C. § 1365(c)(2). In addition, the filing of a citizen suit does not bar EPA or a state from filing a subsequent judicial or administrative action involving the same violations. *Antrim Mining, Inc. v. Davis*, 775 F. Supp. 165 (M.D. Pa. 1991); *U.S. v. Atlas Powder*, 26 Env't Rep. Cases (BNA) 1391 (E.D. Pa. 1987).

agency has taken any type of enforcement action.[17]

Scituate and its progeny have made that leap and transformed that "suggestion" into a substantive law of preclusion which is far broader than the language of the statute. *Gwaltney* offers no support for such a transformation. Rather, *Gwaltney* stressed that "the language of the statute itself" must be the focal point of analysis in FWPCA cases. 484 U.S. at 56. The Court found that the phrase "to be in violation" in section 505(a) of that Act was ambiguous and looked to legislative history and the structure of the statute to help determine its meaning. *Id.* at 57, 61-63. In general, however, the Court found "no reason to believe that Congress' drafting of § 505 was sloppy or haphazard." *Id.* at 65.

In *Pendleton* and similar cases, the Ninth Circuit and other courts have rejected the *Scituate* interpretation of *Gwaltney* on precisely this basis. The Ninth Circuit stated that the "supplement rather than supplant" language in *Gwaltney* "cannot persuade us to abandon the clear language that Congress used when it drafted the statute." 11 F.3d at 886. Similarly, in *Coalition for a Liveable West Side v. NYC Dept. of Environmental Protection, supra,* 830 F. Supp. at 197, the district judge considered this language in *Gwaltney* but held that "[t]he language of § 1319(g)(6) is clear and unambiguous" and that there is "no basis for the First Circuit's redrafting of the statute."

In section 309(g)(6), Congress did not prohibit any duplication between citizen and government enforcement. Congress instead adopted a rule of limited preclusion which allows some

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[17]This conclusion also rests on the false premise that § 309(g)(6) divides the enforcement arena between federal and state governments on the one hand and citizens on the other. In fact, as we have shown above, that section creates no such division. If a state administrative penalty action meets the conditions of that section, the violations covered by that action are immune from both citizen and EPA enforcement.

duplication between government and citizen enforcement if the government enforcement action does not meet the statutory conditions for preclusion. Those conditions relate to the scope of the government action, the time it is filed, and the diligence with which it is prosecuted.[18] Congress' rule of limited preclusion "strikes a balance between two competing concerns: the need to avoid placing obstacles in the path of *** citizen suits and the desire to avoid subjecting violators of the law to dual enforcement or penalties for the same violation." S. Rep. No. 50, 99th Cong., lst Sess. 28 (1985).

This Court should take this opportunity to instruct the lower courts that the plain language of section 309(g)(6), and not this Court's *dicta* in *Gwaltney*, determine whether a citizen suit is precluded.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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[18]Section 309(g)(6)(B) defines two situations in which, based on the relative timing of the two actions, a citizen suit is not precluded by a later government action, even though there may be a complete overlap between the violations alleged in the two actions. 33 U.S.C. § 1319(g)(6)(B). The courts have followed the plain language of this subsection and allowed citizen suits to proceed. *E.g., PIRG v. Hercules, Inc.*, 830 F. Supp. 1525, 1539 (D.N.J. 1993).

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2181

Arkansas Wildlife Federation, Appellant, v. ICI Americas, Inc., Appellee.	)	
United States of America, Amicus Curiae.	)	
Arkansas Environmental Federation; Associated Industries of Arkansas, Inc.; American Iron and Steel Institute; The American Petroleum Institute; The Chamber of Commerce of the United States; National Agricultural Chemicals Association; Acme Metals, Incorporated; Chevron Corp.; GAF Corporation; General Electric Company; Hoechst Celanese Corporation; Murphy Oil USA, Inc.; Owens-Corning Corpation; PMC, Inc.; Sandoz Pharmaceuticals Corporation; Shell Oil Company;	)	Appeal from the United States District Court for the Eastern District of Arkansas

Total Petroleum, Inc.; Witco Corporation,)
Amici Curiae.)

Submitted: December 13, 1993

Filed: July 7, 1994

Before McMILLIAN, FAGG and BOWMAN, Circuit Judges.

McMILLIAN, Circuit Judge.

Arkansas Wildlife Federation (AWF) appeals from a final order entered in the United States District Court[1] for the Eastern District of Arkansas granting summary judgment in favor of ICI Americas Inc. (ICI), and dismissing AWF's action against ICI pursuant to the citizen suit provision of the federal Clean Water Act (CWA), 33 U.S.C. § 1365. Arkansas Wildlife Fed'n v. ICI Americas Inc., 842 F. Supp. 1140 (E.D. Ark. 1993). For reversal, AWF argues that the district court erred in holding that (1) AWF's action was jurisdictionally barred under 33 U.S.C. § 1319(g)(6)(A)(ii), (2) the jurisdictional bar applied to all of ICI's past violations of the CWA, and (3) the jurisdictional bar covered claims for declaratory and injunctive relief, as well as civil penalties. For the following reasons, we affirm the order of the district court.

I. Background

ICI operates a herbicide manufacturing plant in North Little Rock, Arkansas. In 1988, ICI received a permit from the Arkansas

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[1]The Honorable Stephen M. Reasoner, Chief Judge, United States District Court for the Eastern District of Arkansas.

Department of Pollution Control and Ecology (ADPC&E), under the Federal National Pollutant Discharge Elimination System (NPDES) permit program, for wastewater discharge from three point sources (outfalls 001, 002, 003) into waters that flow to the Arkansas River. Pursuant to 33 U.S.C. § 1342, the United States Environmental Protection Agency (EPA) has delegated authority to the State of Arkansas to issue NPDES permits.

Based upon sampling reports that ICI had submitted to ADPC&E, the agency sent notices to ICI during a period of over two years, from late 1988 to early 1991, informing ICI that it was violating pollutant discharge limits mandated under ICI's NPDES permit. By letter dated February 15, 1991, ADPC&E informed ICI that it was subject to enforcement action under the Arkansas Water and Air Pollution Control Act, Ark. Code Ann. § 8-4-101 et seq., and requested a meeting. At a meeting on March 5, 1991, ICI representatives presented ADPC&E with a compliance action plan. The parties agreed to enter into a Consent Administrative Order (CAO). The CAO, effective April 16, 1991, required ICI to pay a civil penalty of $1,000 and to report on its remedial actions and come into compliance with the effluent limitations under the NPDES permit within thirty days. The CAO alternatively required ICI to submit a report setting forth a revised plan for expeditious compliance if ICI were to anticipate failure to comply by the end of the thirty-day period. The CAO stated that it was in full settlement of the civil penalties for violations specified in the Findings of Fact, which listed some, but not all, of ICI's past violations. On September 9, 1991, ICI and ADPC&E executed a corrected CAO which modified the original CAO by specifically incorporating all of ICI's past violations.

By December of 1991, ICI was not in compliance with the effluent limitations under the NPDES permit. On December 26, 1991, ICI asked ADPC&E to extend the compliance deadline to April 30, 1992. ICI's written request contained a summary of ICI's remedial efforts thus far and alleged a need for more time to investigate sources of zinc contamination. ADPC&E granted the

extension and assessed another penalty of $500. In March of 1992, ICI requested a construction permit to lay new piping that would combine the existing three outfalls (001, 002, and 003) into one new outfall (004). ICI represented to ADPC&E that the effluent levels from outfall 004 would fully comply with the limitations under the NPDES permit. ADPC&E granted the construction permit and, on April 30, 1992, issued an amended corrected CAO, which imposed another $500 penalty and required compliance with the NPDES permit by December 15, 1992, except for the zinc limitations.

After completing construction of the new piping, ICI filed for a revised NPDES permit to address the discharge from new outfall 004. Rather than issue a new NPDES permit, ADPC&E issued a second amended CAO, which terminated the existing requirements for outfalls 001, 002, and 003 and imposed sampling and reporting requirements for new outfall 004.[2] ICI was again assessed a penalty of $500. This amended CAO, issued in January of 1993, imposed the same effluent limitations as before, except that there was no limitation for zinc levels. It was effective until October 31, 1993, the date on which ICI's NPDES permit would expire.

In the meantime, on July 2, 1991, after the original CAO was issued, but before any of the corrections or amendments to the CAO were issued, AWF gave ICI notice of its intent to file this citizen suit under the CWA. On October 15, 1991, within 120 days of the notice, AWF filed its complaint alleging ICI's ongoing violations of the CWA and seeking civil penalties, declaratory relief, injunctive relief, and the costs of litigation.

On November 5, 1991, ICI moved to dismiss AWF's complaint. The district court denied ICI's motion without prejudice

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[2]The State did not grant the revised NPDES allegedly because at that time EPA was in the process of changing the federal standards for metals, including zinc.

and allowed limited discovery. After further discovery, ICI filed a motion for summary judgment on the grounds that AWF's suit was jurisdictionally barred under 33 U.S.C. § 1319(g)(6)(A)(ii) and (iii).[3] AWF opposed the motion and filed cross-motions for summary judgment and for injunctive relief. By order of April 8, 1993, the district court granted ICI's motion for summary judgment and dismissed AWF's motions as moot. The district court held that AWF's action was jurisdictionally barred because 33 U.S.C. § 1319(g)(6)(A)(ii) precludes citizen suits for violations "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to [33 U.S.C. § 1319(g)]." The district court further held that the jurisdictional bar applied to all of ICI's past violations of the CWA and covered claims for declaratory and injunctive relief, as well as civil penalties. Arkansas Wildlife Fed'n v. ICI Americas Inc., 842 F. Supp. 1140

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[3]Subsections 1319(g)(6)(A)(ii)and (iii) provide in pertinent part:

(6) Effect of Order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation – * * *

(ii) with respect to which the State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321 (b) of this title or section 1365 of this title.

(E.D. Ark. 1993). AWF appealed.[4]

II. Discussion

We review a grant of summary judgment de novo. The question before the district court, and this Court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Cattrett, 477 U.S. 317, 322-23 (1986). Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. Crain v. Board of Police Comm'rs, 920 F.2d 1402, 1405-06 (8th Cir. 1990). In the present case, the facts were not in material dispute. Rather, the district court disposed of the case based upon its determinations of law. We must now decide whether the district court applied correct legal standards on issues which have not previously been presented to this Court.

A. Jurisdictional bar

We must first decide whether, in dismissing AWF's action as jurisdictionally barred, the district court correctly applied the criteria set forth in 33 U.S.C. § 1319(g)(6)(A)(ii) to the facts of the present case. Specifically, the district court concluded that ADPC&E had commenced and was diligently prosecuting an administrative penalty action against ICI under an Arkansas law comparable to 33 U.S.C. § 1319(g). The district court also concluded that the jurisdictional bar applied to all of ICI's past violations, even though the original CAO only referred to some, but not all, past violations, and the correction which incorporated the remaining past violations was made by ADPC&E after AWF gave

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[4]On this appeal, amicus briefs have been filed by the United States Department of Justice in support of AWF, and a coalition of trade associations and corporations in support of ICI. For the sake of simplifying the discussion, arguments of amici are incorporated into the arguments of the parties.

notice of its intent to file this suit.

AWF first argues that ADPC&E did not "commence" a civil penalty action against ICI by filing the original CAO on April 16, 1991, because, under ADPC&E's own regulations, ADPC&E was required to issue a formal "Notice of Violation" in order to initiate an enforcement action. AWF argues that discussion and issuance of a CAO are intended to precede enforcement actions, not commence them. In support of this argument, AWF notes that none of the usual notice and hearing procedures designed to protect and give access to the public and interested parties are triggered by the execution of CAO, whereas those procedures would be triggered by the issuance of a formal Notice of Violation.

In response, ICI contends that, according to the applicable state regulations, ADPC&E may commence enforcement proceedings either by issuing a Notice of Violation or by filing a CAO (or other similar administrative pleading) with the Secretary of the Arkansas Pollution Control and Ecology Commission. The latter approach initiates formal adjudicatory proceedings; a docket number is assigned to the matter, for example, and interested parties have a right to intervene.

Consistent with our analysis below of the criterion that the state regulatory scheme must be "comparable" to the federal scheme, we hold that the states are afforded some latitude in selecting the specific mechanisms of their enforcement program. The regulations promulgated by ADPC&E provide in pertinent part:

> Except as otherwise provided in Part IV [referring to emergency and/or imminent hazard actions] the Director shall not issue an order, <u>except by consent</u>, to any person for violation of the laws and regulations administered by the Department unless and until such person has been served with a Notice of Violation and had the opportunity to request an adjudicatory hearing thereon in

accordance with the provisions of this Part.

ADPC&E Reg. No 8, Part V, § 2(a)(emphasis added). In the present case, ADPC&E issued an order to ICI with ICI's consent. ADPC&E was therefore not required to issue a Notice of Violation under the regulation cited above. Once the ADPC&E issued the CAO, interested third parties had a right to intervene, and certain notice and hearing procedures became available to interested third parties. Moreover, ICI became subject to further penalties for failure to comply with the CAO. Therefore, we agree with the district court that ADPC&E "commenced" an action within the meaning of 33 U.S.C. § 1319(g)(6)(A)(ii), when it issued the original CAO on April 16, 1991.

AWF also claims that the district court erred in holding that ADPC&E was "diligently prosecuting" an enforcement action against ICI, within the meaning of 33 U.S.C. § 1319(g)(6)(A)(ii). AWF argues that ADPC&E repeatedly and unnecessarily abandoned nearly all of its enforcement powers, failed to address ICI's violations, gave ICI repeated extensions for compliance, and assessed insignificant amounts of civil penalties in comparison to the amounts of ICI's economic benefit and the maximum penalties authorized under the CAO. AWF claims, for example, that ADPC&E assessed only a few $500 penalties for ICI's repeated failures to meet the compliance deadlines under the CAO and yet, by contrast, the daily penalties authorized under the CAO could have totaled as much as $170,000.

In response, ICI emphasized that, from the time the original CAO was issued, ADPC&E required ICI to correct the violations, imposed a compliance and reporting schedule, regularly assessed monetary penalties, and reserved the right to assess additional penalties. ICI submitted and implemented a comprehensive remedial action plan, spent approximately half a million dollars making technological changes, and ultimately did come into compliance with the effluent standards under the NPDES permit. ICI argues that the penalties assessed by ADPC&E reasonably

reflected the history and seriousness of ICI's past violations and took into consideration ICI's financial commitment in implementing technological improvements. Finally, ICI highlights evidence that the penalties assessed were comparable to penalties assessed by ADPC&E in similar cases.

We agree with the district court's conclusions that ADPC&E was "diligently prosecuting" its administrative penalty action against ICI. In Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 60-61 (1987)(Gwaltney), the Supreme Court explained that Congress intended citizen suits brought pursuant to 33 U.S.C. § 1365 to play an "interstitial," rather than "potentially intrusive" role, that such suits are proper only when the federal, state, or local agencies fail to exercise their enforcement responsibility, and that such suits should not considerably curtail the governing agency's discretion to act in the public interest. In North & South Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d 552, 557 (1st Cir. 1991)(Scituate), the First Circuit suggested that courts must afford appropriate deference to the expertise of the agency enforcing the state's environmental laws. It would be unreasonable and inappropriate to find failure to diligently prosecute simply because ICI prevailed in some fashion or because a compromise was reached. Connecticut Fund for the Env't v. Contract Plating Co., 631 F. Supp. 1291, 1294 (D. Conn. 1986). We therefore hold that, under the facts of the present case, ADPC&E was "diligently prosecuting" an administrative penalty action against ICI, within the meaning of 33 U.S.C. § 1319(g)(6)(A)(ii).

Third, AWF argues that the Arkansas enforcement provisions are not "comparable" to the CWA, as required under 33 U.S.C. § 1319(g)(6)(A)(ii), particularly with respect to the public notice and comment provisions of § 1319(g)(4)(A). The federal statute requires that "[b]efore issuing an order assessing a civil penalty under this subsection the Administrator [of EPA] . . . shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order." 33. U.S.C. § 1319(g)(4)(A).

AWF argues that the Arkansas statute is not comparable because it only provides an ex post facto citizen's right to intervene, with no public notice at any time, and no opportunity to comment while the consent order is being proposed.

AWF relies upon NRDC v. Vygen Corp., 803 F. Supp. 97, 100-02 (N.D. Ohio 1992)(Vygen), in which the District Court for the Northern District of Ohio held that Ohio's state laws were not comparable to the CWA, for purposes of applying 33 U.S.C. § 1319(g)(6)(A)(ii), because the state law lacked mandatory procedures for public participation prior to the imposition of a civil penalty. In Vygen, the district court held "since Ohio law has no mandatory public notice requirement, nor a requirement of public notice and opportunity to be heard prior to the issuance of a civil penalty, Ohio's provisions are not comparable to § 1319(g), and plaintiffs' claim is not barred by Ohio's administrative orders." 803 F. Supp. at 102; see also Atlantic States Legal Found. v. Universal Tool & Stamping Co., 735 F. Supp. 1404, 1415-16 (N.D. Ind. 1990).

In response, ICI argues that the term "comparable" means that the state law need only be sufficiently similar to the federal law, not identical. ICI argues that Arkansas law is sufficiently similar because it adequately provides a meaningful opportunity for public participation in the enforcement process. ICI notes that copies of permits, permit applications, and related documentation (e.g., consent orders) are publicly available, Ark. Code Ann. § 8-4-207(6)(A), and that anyone may submit comments, request an adjudicatory hearing, and be made a party to the relevant proceedings. ADPC&E Reg. No. 8, Part VII, § 1. The regulations also provide that any person who either has a statutory right to intervene or has an interest that may be adversely affected by the outcome of the proceeding is entitled to intervene at any stage of the enforcement proceeding by filing a timely petition. ADPC&E Reg. No. 8, Pat VII, § 5. ICI contends that by providing these rights and procedures, Arkansas law satisfies the comparability requirement.

In Scituate, the appellants claimed that the Massachusetts Clean Waters Act, was applied in that case, was not comparable to the federal CWA. The First Circuit rejected that argument stating that "[t]he focus of the statutory bar to citizen's suits is not on state statutory construction, but on whether corrective action already taken and diligently pursued by the government seeks to remedy the same violations as duplicative civilian action." 949 F.2d at 556. The First Circuit held that the Massachusetts law, which is virtually identical to the Arkansas law with respect to interested third-party intervention, was sufficiently "comparable" to the public participation provisions under the federal CWA. Id. at 556 & n.7; see also Saboe v. Oregon, 819 F. Supp. 914, 918 (D. Or. 1993); Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., 777 F. Supp. 173, 182-83 (D. Conn. 1991), rev'd in part on other grounds, 989 F.2d 1305 (2d Cir. 1993). The common thread running through these cases is a finding that the overall regulatory scheme affords significant citizen participation, even if the state law does not contain precisely the same public notice and comment provisions as those found in the federal CWA. We agree with the reasoning in Scituate that the comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests. 949 F.2d at 556 & n.7. Under those circumstances, the state statute should be presumed comparable unless the facts of the specific case demonstrate that the state denied an interested party a meaningful opportunity to participate in the administrative enforcement process. Notably, on the facts of the present case, AWF had actual notice of ADPC&E's issuance of the CAO when it inspected ADPC&E's files five months before this lawsuit was filed. AWF could have intervened in the administrative process but instead chose to collaterally attack the enforcement action through this federal lawsuit. We have no reason to believe that AWF would have been denied meaningful participation in the administrative process had it intervened. We

therefore hold that the Arkansas statute is "comparable" to 33 U.S.C. § 1319(g) for purposes of applying 33 U.S.C. § 1319(g)(6)(A)(ii) to the present case.[5]

B. Civil penalties

AWF separately argues that it should at least have been permitted to seek civil penalties for violations not specifically addressed in the original April 1991 CAO. AWF relies on 33 U.S.C. § 1319(g)(6)(B)(ii), which provides that a citizen suit will be allowed, despite a state administrative enforcement action, if notice was served prior to the commencement of the state action and the citizen suit was filed within 120 days of the notice. AWF sent its notice of intent to sue to ICI after the original CAO was issued but before the corrected CAO was issued on September 9, 1991, specifically incorporating all of ICI's past violations. AWF's argument assumes that, if the original CAO "commenced" a state administrative enforcement action, then each corrected or amended CAO also "commenced" a new and separate administrative action. In response, ICI argues, and we agree, that the district court correctly found that the original CAO, and the corrected and amended CAOs, were all part of a single ongoing enforcement action and therefore § 1319(g)(6)(B)(ii) does not apply.

C. Declaratory and injunctive relief

Finally, AWF argues that the district court erred in dismissing its claims for declaratory and injunctive relief, instead of dismissing only the claims for civil penalties. Citing Scituate,

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[5]AWF also argues that the district court's reliance on 40 C.F.R. § 123.27 as support for its comparability finding is misplaced because that regulation refers to EPA's requirements for delegating NPDES permitting authority to the states, not the standard for precluding citizens suits, which are specifically intended to complement federal and state agency enforcement. We agree with AWF that 40 C.F.R. § 123.27 is not particularly germane to the comparability analysis for purposes of applying 33 U.S.C. § 1319(g)(6)(A)(ii).

949 F.2d at 557-58, the district court reasoned that policy considerations which prevent AWF from bringing claims for civil penalties equally apply to AWF's claims for declaratory and injunctive relief.

AWF relies on the language of the relevant statute for the proposition that the jurisdictional bar on citizen suits, when applicable, only applies to claims for civil penalties. Section 1319(g)(6)(A) provides that a violation that is being prosecuted by the state in an administrative enforcement action shall not be the subject of a "civil penalty action" brought pursuant to 33 U.S.C. § 1365, but makes no mention of whether a citizen could otherwise bring an action for declaratory or injunctive relief. Section 1319(g)(6)(B) also refers to the limitation in subparagraph (A) on "civil penalty actions" under 33 U.S.C. § 1365. By contrast, 33 U.S.C. § 1365(a) clearly contemplates declaratory and injunctive relief, in addition to civil penalties, as possible remedies in citizen suits; it provides that "[t]he district courts shall have jurisdiction . . . to enforce . . . an effluent standard or limitation." AWF urges this Court to adopt the holding in Coalition for a Liveable West Side v. New York City Dep't of Envtl. Protection, 830 F. Supp. 194, 196-97 (S.D.N.Y. 1993). In that case, the district court rejected the contrary holding in Scituate as follows:

> I find no basis for the First Circuit's redrafting of the statute. The language of § 1319(g)(6) is clear and unambiguous. Its bar applies only to civil penalty actions. Nor do I find any basis for the assertion that such a rule is irrational. As written, § 1319(g)(6) ensures that an entity that has violated the CWA will not be subject to duplicative civil penalties for the same violations. On the other hand, the statute permits a federal district court to entertain an action for injunctive relief for situations where, for example, a permit holder may have paid the relevant civil penalties but continues to violate its permit limitations or

> where the injunctive relief obtained in the state proceedings turns out to be inadequate to address the violations at issue. -

830 F. Supp. at 197.

ICI, in response, relies heavily on Scituate. The First Circuit reasoned in Scituate that, in spite of the plain language of the statute, it would be not only "undesirable," but "absurd," to preclude citizens' claims for civil penalties, but not declaratory and injunctive relief. 949 F.2d at 557-58. ICI also relies on Gwaltney, in which the Supreme Court held "[33 U.S.C. § 1365] does not authorize civil penalties separately from injunctive relief; rather the two forms of relief are referred to in the same subsection, even in the same sentence." 484 U.S. at 58.[6]

We do not go so far as to say that it would be "absurd" to preclude citizens' claims for civil penalties without also precluding claims for declaratory and injunctive relief under the same circumstances. However, we agree with the First Circuit's assessment of such a result as "unreasonable." Allowing suits for declaratory and injunctive relief in federal court, despite a state's diligent efforts at administrative enforcement, could result in undue interference with or unnecessary duplication, of the legitimate efforts of the state agency. We believe that such a result would undermine, rather than promote, the goals of the CWA, and is not the intent of Congress. Accordingly, we hold that the district court did not err in dismissing AWF's entire action, including its claims for declaratory and injunctive relief.

For the foregoing reasons, the order of the district court is

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[6]AWF distinguishes the present case from Gwaltney on grounds that, in Gwaltney, the Supreme Court addressed whether civil penalties could be sought in the absence of a claim for injunctive relief, not the converse situation presented here. In the present case, the issue is whether declaratory and injunctive relief may be sought in the absence of a claim for civil penalties.

affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2181EALR

Arkansas Wildlife Federation, Appellant,	*	
	*	Order Denying Petition
vs.	*	for Rehearing and
	*	Suggestion for Rehearing
ICI Americas, Inc. Appellee.	*	En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 12, 1994

Order Entered at the Direction of the Court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ARKANSAS WILDLIFE FEDERATION	)	
Plaintiff,	)	
	)	
v.	)	No. LR-C-91-681
	)	
ICI AMERICAS INC.,	)	
Defendant.	)	
	)	

ORDER

Presently before the Court is Defendant's Motion for Summary Judgment (Document #26). For the reasons stated herein, the motion is granted and plaintiff's complaint is dismissed.

I. FACTS

On September 30, 1988 the Arkansas Department of Pollution Control & Ecology (ADPC & E) issued Federal National Pollutant Discharge Elimination System (NPDES) Permit No. AR0042901 to defendant, ICI Americas, Inc. (ICI). ICI is engaged in the production of liquid and granular thiocarbamate and organophosphate herbicides. ICI's North Little Rock facility discharges wastewater into the Arkansas River.

During December, 1988 through February, 1991, ADPC & E sent notices to ICI informing it that it had committed violations of various limits contained in its NPDES permit. ADPC & E requested a meeting with ICI by letter dated February 15, 1991, which informed ICI that it was subject to enforcement action under the Arkansas Water and Air Pollution Control Act (AWAPCA).

During that meeting, Irvin Wheeler, ICI North Little Rock Plant Manager, and R. Hayes Baber, ICI Quality Control Supervisor, presented Mark Bradley, Enforcement Engineer in the NPDES Enforcement Section, and Joseph Williford, ADPC & E Enforcement Supervisor, NPDES Enforcement Division, with a copy of an ICI NPDES Compliance Project Action Plan dated February 28, 1991. A settlement was reached whereby the parties agreed to execute a Consent Administrative Order (CAO) which required ICI to pay a $1,000 civil penalty and implement the measures in the ICI NPDES Compliance Project Action Plan. The CAO was effective April 16, 1991.

A Corrected CAO was reissued on September 9, 1991. The Corrected CAO reflects that ICI had agreed to pay the $1,000 civil penalty in full settlement of all permit violations occurring up to the date of the Order. It also left open the possibility of future remedies or sanctions by ADPC & E.

On July 2, 1991, plaintiff, Arkansas Wildlife Federation, notified ICI that it intended to file the present lawsuit. Plaintiff filed the Complaint on October 15, 1991, less than 120 days after their notice was given.

On December 26, 1991, ICI filed a Request for Extension of Schedule of Compliance with ADPC & E. The request asked for a continuance of the compliance date to April 30, 1992 so that, according to ICI, it could be allowed to further investigate sources of zinc contamination and make any necessary changes. On December 27, 1991, ADPC & E granted the request as reasonable and required ICI to pay another $500.00 administrative penalty for noncompliances occurring after the date of the Corrected CAO.

On March 13, 1992, ICI requested authorization to lay additional piping to combine outfalls into one outfall. ICI represented that by doing so, it could demonstrate compliance with all permit limits. On April 2, 1992, ADPC & E approved ICI's request and issued Construction Permit No. 42901C1. On April 30,

1992, ADPC & E amended the CAO to allow ICI until December 15, 1992 to come into compliance with the terms and conditions of its NPDES Permit. The amendment levied an additional $500.00 in penalties but provided that ICI would not be assessed any additional penalties for the presence of zinc as long as it complied with the terms of the CAO.

On January 7, 1993, ADPC & E and ICI entered into Amendment #3 (Nunc Pro Tunc) to Corrected Consent Administrative Order. This third amendment states:

> Effective on December 15, 1992, and continuing until Oct. 31, 1993, all reporting for Outfalls 001, 002, and 003 shall be terminated and the Permittee will not be required to conduct sampling at these points. Effective on Dec. 15, 1992 and continuing until Oct. 31, 1993, the Permittee shall monitor and report discharge from Outfall 004 as established under Construction Permit No. 42901C1. The discharge limitations for Outfall 004 shall be the same as those specified for Outfall 001 under the existing permit number AR0042901 (Page 1A of Part 1), with the exception of Zinc, Total Recoverable. The requirement for Zinc, Total Recoverable, shall be "report only" for Outfall 004 with this limitation also expiring on Oct. 31, 1993.

The amendment further states that there were no violations of Amendment No. 2 to the CAO. Nevertheless, the amendment required ICI to pay a civil penalty of $500.00 "in compromise and full settlement of any claims for civil penalties."

Defendant has now moved for summary judgment. According to its brief, defendant claims that:

> the limitations to citizen suits in section 309(g)(6)(A)(ii) and (iii) of the Clean Water Act, 33 U.S.C. § 1319(G)(6)(a)(ii) and (iii), bar Plaintiff from bringing this action because the Arkansas Department of Pollution

> Control & Ecology ... has prosecuted an administrative enforcement action against ICI for the same NPDES permit violations pursuant to Arkansas law, which is comparable to the administrative enforcement provisions in the Clean Water Act, and (1) the enforcement action has resulted in the issuance of final orders that are no longer subject to judicial review and the payment of civil penalties by ICI; *or alternatively*, (2) the enforcement action has been and continues to be diligently prosecuted by the ADPC & E.

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT at 2.

II. 33 U.S.C. § 1319(g)(6)(A)(ii) and (iii)

33 U.S.C. § 1319(g)(6)(A) provides in pertinent part that:

> Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation --
>
> > (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,
> >
> > (ii) with respect to which the State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
> >
> > (iii) for which the Administrator, the Secretary, of the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,
>
> shall not be the subject of a civil penalty action under

subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

The Court will address defendant's § 1319(g)(6)(A)(ii) argument first.

A. Section 1319(g)(6)(A)(ii)

1. "Commenced" and "Violation"

Defendant states that ADPC & E has "commenced" an action addressing every violation raised by plaintiff. This Court has previously found in the Order of April 23, 1992, that ADPC & E commenced an action by issuing the CAO on April 16, 1991, and sees no reason to disturb that finding. Thus, the remaining issue is whether the CAO and the amendments thereto were intended to cover all violations alleged by plaintiff.

Defendant argues that the language of the Corrected CAO demonstrates that the original CAO was intended to cover all violations occurring to that point. The Corrected CAO states:

> In compromise and full settlement of all violations occurring up to and including the date this Order is executed by the Director of the ADPC & E, including those specified in the Findings of Fact, the permittee agrees to pay to ADPC & E the total sum of One Thousand Dollars ($1,000) as a voluntary civil penalty.

DEFENDANT'S EXHIBIT 8 at 5-6. Apparently, the problem arises from the language of the original CAO which states:

> In compromise and full settlement of the civil penalties for violations (specified in the Findings of Fact), the Permittee agrees to pay to ADPC & E the total sum of One Thousand Dollars ($1000) as a voluntary civil penalty.

DEFENDANT'S EXHIBIT #7 at 4. Plaintiff does not dispute that the Corrected CAO covers all violations up to the date of the order, but points out that Mark Bradley, an Enforcement Engineer in ADPC & E's NPDES Enforcement Section, stated in deposition that ADPC & E had never before corrected a CAO to expand the scope of covered violations. DEFENDANT'S EXHIBIT #5 at 25-26. However, defendant points out that Mr. Bradley also stated it was the department's intent to issue a civil penalty that addressed all past violations dating back to the beginning of the permit. *Id.* at 13, 35-36. The Court agrees with defendant and finds that the civil penalty assessed in the original CAO was intended to cover all past violations.

Furthermore, the three amendments to the CAO have all assessed civil penalties that purport to cover all violations occurring up to their respective dates of entry. Therefore, in this Court's opinion the action commenced and penalties assessed by ADPC & E do cover all violations of which plaintiff could possibly complain.

2. "Comparability"

Defendant next argues that the provisions in the Arkansas Water and Air Pollution Control Act for assessing administrative penalties are "comparable" to those in 33 U.S.C. § 1319(g).

a. Penalty Provisions

Defendant states that the ADPC & E has been empowered to seek criminal, civil and administrative penalties against persons who violate any rules, regulations, orders, permits, or plans issued pursuant to the AWAPCA. ARK. CODE ANN. § 8-4-103. Also, the penalty provisions are, according to defendant, generally patterned after those in 33 U.S.C. § 1319. Sections 8-4-103(c) and (d) provide that a penalty of $10,000 per day per violation may be assessed, or in the alternative, the civil penalty may be equal to the amount of any pecuniary gain the violator derived from

commission of the offenses. 33 U.S.C. § 1319(g)(2)(A) and (B) also provide for penalties of $10,000 per violation or per day during which the violation continues.

Plaintiff counters that when the agreement between ADPC & E and defendant was finalized on April 8, 1991, the maximum penalty was only $5,000 per violation. Thus, defendant's maximum penalty for all violations occurring between November of 1988 and June of 1992 was only $760,000 in contrast to a maximum of $1,280,000 under federal law. However, as defendant points out, the $10,000 maximum penalty became effective on April 9, 1991, and the effective date of the CAO was April 16, 1991.

Defendant also points out that the factors the commission must consider in determining the amount of an administrative civil penalty are similar to those in 33 U.S.C. § 1319(g)(3).[7] The

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[7] ADPC & E Reg. No. 7, § 9, states that PC & E is required to consider the following factors:

> (a) The seriousness of the noncompliance and its effect upon the environment, including degree of risk or harm to public health, caused by the violation.
>
> (b) Whether the cause of the noncompliance was an unavoidable accident.
>
> (c) The violator's cooperativeness and efforts to correct the violation.
>
> (d) The history of a violator in taking all reasonable steps or procedures necessary or appropriate to correct any noncompliance.
>
> (e) The violator's history of previous documented violations within the last six months regardless of whether or not any administrative, civil, or criminal proceeding was commenced therefore.
>
> (f) Whether the cause of a violation was an intentional act or omission on the part of the violator.
>
> (g) Whether the noncompliance has resulted in an economic benefit to the violator.
>
> (h) Whether the investigation enforcement action has resulted in unusual or extraordinary costs to the Department or the public.
>
> (i) Whether any part of the noncompliance is attributable to the action or inaction of the state government itself.

respective factors are indeed similar.

In sum, the penalty and related provisions under Arkansas law are comparable to those under federal law. The factors in determining the amount of a civil penalty are similar, and whether the maximum penalty at relevant times was $5,000 or $10,000 would not alter this Court's determination that the Arkansas penalty provisions are comparable to the corresponding federal provisions.

b. Notice and Comment

The provisions of the federal statute that provide for public participation are found in 33 U.S.C. § 1319(g)(4). That section reads:

> (A) Public notice
>
> Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.
>
> (B) Presentation of evidence
>
> Any person who comments on a proposed

---

33 U.S.C. § 1319(g)(3) states:

> In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account that nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as a case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

Defendant points out that the provisions pertaining to hearings before ADPC & E are set forth in §§ 8-4-205, 8-4-210, 8-4-212, and 8-4-218 to 8-4-221, along with ADPC & E Reg. No. 8, Part V. Specifically, defendant states that ADPC & E regulations provide that:

> Any person who has submitted comments on an enforcement matter can request an adjudicatory hearing and can be made a party to the proceeding conducted by the Department. ADPC & E Reg. No. 8, Part VII, § 1. Additionally, "any person" may intervene "at any stage of

the proceeding" if such person timely files a petition to intervene and, either had a statutory right to initiate the proceeding, or has an interest which may be adversely affected by the outcome of the proceeding. *Id.*, Part VII, § 5. *By providing this right to intervene, Arkansas law complies with the applicable federal requirement for public participation in enforcement proceedings. See* 44 C.F.R. § 123.27(d)(1).

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT at 21.

Indeed, 44 C.F.R. § 123.27(d) provides:

> Any state administering a program *shall provide for public participation* in the State enforcement process *by providing* either:
>
> (1) *Authority which allows intervention as of right in any civil or administrative action ... by any citizen having an interest which is or may be adversely affected;* or
>
> (2) Assurance that the State agency or enforcement authority will:
>
> (i) Investigate and provide written responses to all citizen complaints....;
>
> (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and
>
> (iii) publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action. (emphasis added).

It is clear that ADPC & E Reg. No. 8, Part VII, § 5 complies with § 123.27(d)(1) in that it allows for intervention as of right if the petitioner files a timely petition to intervene and either (1) had a statutory right to initiate the proceeding or (2) has an interest which is or may be adversely affected by the outcome of the proceeding. Also, the court in *Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156 (D.C. Cir. 1988), confirmed that § 123.27(d) provides "meaningful and adequate opportunity for public participation consistent with the statutory mandate."

Further, in *North and South Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552 (1st Cir. 1991), the court granted summary judgment under facts almost identical to those at bar. According to that court, the plaintiff contended that the state law was not comparable to federal law because it did not create rights of notice and comment, public participation and rights of appeal identical to the Federal Act. The court disagreed and stated:

> Under the State Act: (1) Administrative Orders are public documents, *see* M.G.L. c. 4, § 7; (2) upon showing adequate cause, any individual may intervene in actions brought to assess civil penalties, *see* 310 C.M.R. § 1.01(a), (f); and (3) any person with an interest in the matter has the opportunity to file a claim for an individual hearing, *see* 310 C.M.R. § 1.01(b). *So long as the provisions in the State Act adequately safeguard the substantive interests of citizens in enforcement actions, the rights of notice and public participation found in the State Act are satisfactorily comparable to those found in the Federal Act.*

Id. at 556 n. 7 (emphasis added). Arkansas law provides the same procedural safeguards as the statute before the Court in *Scituate*.

Plaintiff cites several cases in support of their argument that Arkansas does not provide an opportunity for public

participation comparable to federal law.[8] Although these cases tend to take a more restrictive view of "comparability," the Court is satisfied that the right to public participation under Arkansas law is sufficiently comparable to § 1319(g), especially in view of 40 C.F.R. § 123.27(d).

c. Judicial Review

Finally, defendant asserts that the provisions for judicial review are comparable to those found in 33 U.S.C. § 1319(g)(8).[9] According to defendant, an administrative order issued by the Director of ADPC & E is subject to review by the Commission upon the filing of a request by a party within 30 days of the order. ADPC & E Reg. No. 8, Part V, § 7 *et seq.*, and part VIII. Also, judicial review of any final order can be brought in the state circuit courts by any person who may be adversely affected thereby. ARK. CODE ANN. § 8-4-222. Plaintiff did not argue that the judicial review portions of the Arkansas scheme are not comparable to the federal scheme.

d. Conclusions as to Comparability

This Court is satisfied that Arkansas law is comparable to federal law as required by 33 U.S.C. § 1319(g) and is in agreement

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[8] *Public Interest Research Group of New Jersey, Inc. v. GAF Corp.*, 770 F. Supp. 943 (D.N.J. 1991); *Atlantic States Legal Foundation v. Universal Tool & Stamping Co., Inc.*, 735 F. Supp. 1404 (N.D. Ind. 1990); and *Pennsylvania Environmental Defense Fund v. Mount Pocono Municipal Authority*, Civil No. 90-1208 (M.D. Pa. May 14, 1991).

[9] 33 U.S.C. § 1319(g)(8) provides in pertinent part:

> Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment ... by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued....

with the interpretation of comparability given by the First Circuit in *Scituate*. If this Court were to follow plaintiff's reasoning, § 1319(g) "would enable citizen's suits to undermine the supplemental role envisioned for section 505 citizen's suits, `changing the nature of the citizen's role from interstitial to potentially intrusive.'" *Scituate*, 949 F.2d at 556 (quoting *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 61, 108 S. Ct. 376, 383, 98 L.Ed.2d 306 (1987)).

The EPA has noted its disagreement with the decision in *Scituate* in a guidance memorandum dated March 5, 1993. However the Court notes that EPA's position would be similar to that of plaintiff's in that § 1319(g) would prevent the EPA as well as a citizen from bringing a contemporaneous enforcement action. Furthermore, the Court agrees with the reasoning in *Scituate* that "[i]t is enough ... that the overall scheme of the two acts[10] is aimed at correcting the same violations, thereby achieving the same goals." *Id.*

3. Diligent Prosecution

The Supreme Court in *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 61, 108 S. Ct. 376, 383, 98 L.Ed.2d 306 (1987) took a narrow view of the role of citizen's suits.

> The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action. The legislative history of the Act reinforces this view of the role of the citizen suit. The Senate Report noted that "[t]he Committee intends the great volume of enforcement actions [to] be brought by the State," and that citizen suits are proper only "if the Federal, State, and local agencies

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[10] state and federal.

fail to exercise their enforcement responsibility."

Id., 484 U.S. at 60, 108 S. Ct. at 383 (quoting S. Rep. No. 92-414, p. 64 (1971), reprinted in 2 A Legislative History of the Water Pollution Control Act Amendments of 1972 p. 1482 (1973)). Also, in *Connecticut Fund for the Environment v. Contract Plating Co., Inc.*, 631 F. Supp. 1291 (D. Conn. 1986) the court stated that there is a presumption of diligence "absent persuasive evidence that the state is currently engaged in a pattern of conduct that could be considered dilatory, collusive or otherwise in bad faith." *Id.* at 1293. And in *Scituate*, the court was of the opinion that where a state agency had addressed the concerns of an analogous citizen's suit, "deference to the agency's plan of attack should be particularly favored." *Scituate*, 949 F.2d at 557. This Court is in agreement with the general theme of these cases that the state agency must be given great deference to proceed in a manner it considers in the best interests of all parties involved.

Defendant states that the April 16, 1991 CAO and the Corrected CAO require ICI to:

> "take whatever corrective action is necessary to eliminate and prevent recurrence of the effluent violations cited in the [Order]" and establish a specific schedule of compliance requiring ICI to report to ADPC & E the specific corrective actions that are being taken to prevent recurrence of the non-complaint discharges.

DEFENDANT'S BRIEF IN SUPPORT at 32-33 (quoting, Corrected CAO at pp. 4-5, ¶¶ 1-3). Also, while the CAO has been amended on several occasions and the compliance schedule has been extended, defendant argues that this demonstrates that ADPC & E is providing ongoing supervision and enforcement of the CAO. Further, defendant asserts that ADPC & E has required ICI to pay additional administrative penalties for noncompliances occurring after the original CAO.

On the other hand, plaintiff argues that the relatively small penalty amounts assessed in the case at bar were arbitrarily set without consideration of either the economic benefit that defendant gained from the violations or the seriousness of the violations. However, as defendant points out, although the amount of the penalties are substantially less than the maximum allowed by statute, they are consistent with the penalties ADPC & E has required other permit holders to pay. *See,* DEFENDANT'S EXHIBIT # 24. Also as defendant points out, it had developed a plan which required a significant capital outlay to correct noncompliances prior to their initial meeting with ADPC & E. The deposition of Mark Bradley confirms that ADPC & E considered this an important factor when determining the penalty. *See*, DEFENDANT'S EXHIBIT # 5 at 14.[11] Also, ADPC & E Reg. No. 7, § 9, indicates that "[t]he violator's cooperativeness and efforts to correct the violation" are valid factors in determining the amount of the civil penalty.

Plaintiff also complains that ADPC & E granted two large extensions of time to comply with the CAO in return for two $500 penalties. According to plaintiff, the stipulated penalties in the CAO would have been over $50,000 on the first occurrence and over $120,000 on the second. Plaintiff cites two cases for its

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[11] In pertinent part, the deposition reads:

Q. How did you calculate that penalty?

A. It was based upon professional judgment, based upon their having developed a plan that we weren't even aware of that they had presented at the meeting, that they were taking action before we called them into a meeting, and looked at the number of violations and addressed the $1,000 penalty.

. . . . . .

Q. Why did you to with the minimum?

A. Because they had taken action on developing a plan which was going to involve some capital outlay. It wasn't a problem that was being ignored. They were already addressing it, so we decided we'd go with the minimum penalty.

statement that, "When a state does not demand compliance with its orders and grants extensions of time, its prosecution is not diligent." PLAINTIFF'S BRIEF IN OPPOSITION at 36. Although both cases involve situations where a state agency allowed numerous extensions for the permittee to comply, the cases are distinguishable from the facts at bar.

In *Dague v. City of Burlington*, 935 F.2d 1343, 1353 (2d Cir. 1991), the defendant, City of Burlington, failed to install two systems which were required by the Assurance entered into between the defendant and the state. The only action taken by the state to enforce the Assurance was taken after the deadline for installation had already passed. In addition, the plaintiff had already filed the lawsuit and the district court had already ordered the defendant to install the systems. Given this background, the court stated, "Beyond this one action, the state made no attempt to ensure compliance with the rest of the Assurance; instead it allowed the city numerous extensions."

The second case cited by plaintiff is *New York Coastal Fishermen's Assoc. v. New York City Dep't of Sanitation*, 772 F. Supp. 162 (S.D.N.Y. 1991). There, the court dealt with a situation in which the defendant and the state entered into a consent order in 1985 that allowed a deadline for project completion of December 31, 1989. Under that order a temporary plan was to have been submitted by December 31, 1986. However, after what the court characterizes as "irrelevant excuses for the delay," the defendant submitted the temporary plan in July of 1988. This plan was rejected and another order was entered into in 1990. Oral arguments revealed that the new estimated time for project completion was 1995. The court stated:

> This is simply too long to rectify a problem that has been knows about since 1983.... As defendants themselves recognize, "citizen suits [can proceed in] those instances where the federal and state entities are not fulfilling their enforcement duties." This is precisely such an instant

when the government has not been fulfilling its duties.

Id. at 169 (citations omitted).

The egregious facts found in these two cases are not present in the case at hand. As defendant points out, the extensions in this case were based on defendant's requests for additional time so that more research could be done on the source and possible remedies of noncompliances that were occurring with zinc. The evidence shows that the first extension was granted after a meeting with ADPC & E and a subsequent written request. This request indicates that almost all of the engineering changes under the project action plan submitted by defendant and approved under the CAO were completed prior to the December 31, 1991, deadline and that defendant had identified all sources of contamination with the exception of zinc. *See*, DEFENDANT'S EXHIBIT # 10. In regards to the second extension, the cover letter on defendant's request for a construction permit for outfall 004 evidences defendant's intent to combine the existing outfalls into one new outfall and it's belief that by doing so it could comply "with each of the permit parameters, including zinc." *See*, DEFENDANT'S EXHIBIT #15.

In sum, the extensions granted in this case were based on defendant's needs for additional time to address and correct problems that existed in the levels of zinc occurring in the outfalls. Given defendant's level of action during these periods, its apparent attempts to remedy the problem, and the relatively short periods of time granted, it was a reasonable course of action for ADPC & E to grant these extensions.

Plaintiff next points out that ADPC & E waived any further penalties for future reported zinc violations. In plaintiff's opinion, "PC & E simply gave defendant a license to pollute." However, defendant cites a memorandum in which Randal Oberlag, ADPC & E Enforcement Engineer/Attorney states that:

The implementation strategy for metals is currently being

> developed by the Department based on EPA Rule promulgation and as a result the Department is unable to continue with this request. Until the strategy is finalized, limits on metals for permits and permit modifications cannot be given. Since ICI's present permit expires on Oct. 31, 1993, and there is no methodology at present for giving zinc limits, the Amendment extending monitoring and reporting conditions through Oct. 31, 1993 and requiring "report only" for zinc was appropriate. The facility agreed to be bound by the remaining limits of the "3 terminated outfalls" for Outfall 004.

See, DEFENDANT'S EXHIBIT #2 (attached to Defendant's Response to Plaintiff's Amended Motion (# 63)). Apparently, ADPC & E is currently developing its strategy for setting limits on discharge of metals such as zinc.

In the Court's opinion, defendant has demonstrated that ADPC & E is diligently prosecuting its enforcement action against defendant. What plaintiff characterizes as arbitrary decisions on the part of ADPC & E appear to the Court as reasoned cooperative efforts to remedy noncompliances with the permit. Under the circumstances described above, this Court is of the opinion ADPC & E's efforts to remedy the permit violations must be characterized as diligent prosecution. It cannot be said that ADPC & E has failed "to exercise [its] enforcement responsibility." *Gwaltney*, 484 U.S. at 61.

B. Section 1319(g)(6)(A)(iii)

Given this Court's opinion on the applicability of § 1319(g)(6)(A)(ii), it is unnecessary to address defendant's arguments that § 1319(g)(6)(A)(iii) also preclude plaintiff from bringing the present action.

III. 33 U.S.C. § 1319(g)(6)(B)

Defendant next argues that neither of the two exceptions contained in § 1319(g)(6)(B) are applicable to this case. That section reads:

> The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which --
>
> > (i) a civil action under section 1965(a)(1) of this title has been filed prior to commencement of an action under this subsection, or
> >
> > (ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

Plaintiff argues only that subsection (ii) is applicable. According to plaintiff, if the April, 1991, CAO constitutes (and this Court has held that it does) the commencement of an action, the Corrected CAO and the amendments thereto must also constitute the commencement of new enforcement actions that did not begin before it gave notice of its intention to file suit. The Court disagrees. The Corrected CAO and the amendments thereto represent an ongoing enforcement action on ADPC & E's behalf. To adopt plaintiff's broad interpretation would hamper ADPC & E's ability to conduct ongoing negotiations with permit holders outside the realms of the filing an actual adversary lawsuit. To the contrary, defendant and ADPC & E have been able to cooperate and avoid such a suit, and the Court cannot accept plaintiff's interpretation.

IV. THE SCOPE OF 33 U.S.C. § 1319(g)(6)

Plaintiff argues that § 1319(g)(6) bars only actions seeking civil penalties and not actions for injunctive relief. *See, New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation*, 772 F. Supp. 162, 169 (S.D.N.Y 1991), and *PIRG v. Witco Chemical Corp.*, 31 ERC 1571, 1576, 1990 WL 66178 (D.N.J. 1990). However, the First Circuit in *Scituate* reached a contrary conclusion. In response to the plaintiff's argument that the literal language of § 1319(g)(6) speaks only of civil penalties and that the ban on citizen suits only extends to penalty actions, the court stated:

> Even if the literal reading of section [1319] does lead to such a result, that result would lead to deferring to the primary enforcement responsibility of the government only where a penalty is sought in a civilian action, as if the policy considerations limiting civilian suits were only applicable within the context. Such a result would not only be undesirable, *see Gwaltney* 484 U.S. at 60-61, 108 S. Ct. at 383-384, it would be absurd.

Scituate, 949 F.2d at 558. This Court is in agreement that the policy considerations which prevent plaintiff from bringing a contemporaneous civil penalty action also must preclude plaintiff's injunctive and declaratory requests. Until it is shown that ADPC & E is not diligently pursuing their enforcement action against defendant, its efforts to remedy the situation should not be hampered by contemporaneous citizen suits.

V. CONCLUSION

In sum, the Court is of the opinion that ADPC & E is diligently prosecuting an enforcement action under the state law that is comparable to federal law and that plaintiff's complaint should be dismissed in its entirety. Any remaining motions in this matter are moot.

IT IS SO ORDERED this 8th day of April, 1993.

s/ Stephen M. Reasoner
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ARKANSAS WILDLIFE FEDERATION PLAINTIFF

VS No. LR-C-91-681

ICI AMERICAS, INC. DEFENDANT

* *

DISCOVERY DEPOSITION OF MARK BRADLEY
(Taken June 17, 1992)

* *

[Excerpts]

* * *

[page 4]

BY MR. LEDBETTER:

Q: State your name for the record, please.

A: It's Mark Bradley.

Q: Mark, where are you employed?

A: Arkansas Department of Pollution Control & Ecology.

* * *

[page 6]

Q: What was your period of employment the first time with Arkansas Department of Pollution Control & Ecology?

A: From August 1990 until September 1991.

Q: What were your duties with PC&E during that period of time?

[page 7]

A: The first two months that I was here -- I guess actually just the first month, about a month-and-a-half -- I was with NPDES permits. I was a permit writer. Then from October of '90 until I left the agency, I was with enforcement, NPDES enforcement.

* * *

[page 8]

Q: I want to hand you a document and see if you can identify that.

A: (Reviewed document.) Yes, this was the letter that I sent out to set up the meeting for potential enforcement action.

Q: Why did you send that letter to ICI?

A: Well, in reviewing the files, they had had some problems with zinc violations, COD, and a couple of times with total suspended solids. And we set up a meeting to discuss the violations, to see what they were doing, if anything, to correct them and what corrective action, if any, we needed to take.

* * *

[page 9]

Q: Did you meet with representatives of ICI on March 5th?

A: Yes.

Q: Tell me about that meeting. Who was present?

A: It was Hayes Baber and Irvin Wheeler, and Joe Williford was also present, who is my supervisor. And what we discussed were the 30 violations and to see what action, if any, they had

[page 10]

taken because of those violations. * * *

[page 13]

Q: Okay. And what was the penalty that was proposed?

[page 14]

A: $1,000.

Q: How did you calculate that penalty?

A: It was based on professional judgment, based upon their having developed a plan that we weren't even aware of that they had presented at the meeting, that they were taking action before we called them into a meeting, and looked at the number of violations and addressed the $1,000 penalty.

Q: For 30 violations of a permit, how do you -- I mean, what factors are used in calculating? Did you prepare a document that reflects how you decided the penalty should be calculated? I mean, was there a dollar value per violation? Was it higher for COD and lower for zinc? How did you calculate this?

A: A $1,000 penalty was the minimum penalty typically that

we would look at, so we went with that penalty.

Q: Why did you go with the minimum?

A: Because they had taken action on developing a plan which was going to involve some capital outlay. It wasn't a problem that was being ignored. They were already addressing it, so we decided we'd go with the minimum penalty.

* * *

[page 15]

Q: Are you familiar with the concept of economic benefit for non-compliance?

A: Yes.

Q: Are you aware of EPA -- the Environmental Protection Agency's methods of calculating economic benefit?

A: Yes.

Q: Have you, yourself, been involved in calculating economic benefit for non-compliance?

A: I have not.

Q: Who does that here?

A: As I understand it, it's now being done by the enforcement

[page 16]

engineers through the enforcement section.

Q: But when you were an enforcement engineer, you weren't

familiar with how to do that?

A: Correct.

Q: That wasn't being used at the time?

A: At that time we were not using it.

Q: So in this case, you did not calculate an economic benefit for ICI?

A: I did not.

Q: And did you request any information that would allow you to calculate an economic benefit for ICI?

A: No.

Q: Do you have any idea what their economic benefit was as a result of this non-compliance?

A: I don't.

* * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ARKANSAS WILDLIFE FEDERATION PLAINTIFF

VS No. LR-C-91-681

ICI AMERICAS, INC. DEFENDANT

* *

DISCOVERY DEPOSITION OF R. HAYES BABER
(Taken June 16, 1992)

* *

[Excerpts]

* * *

[page 4]

BY MR. LEDBETTER:

Q: State your name, please.

A: First initial "R," middle name Hayes, last name Baber.

Q: Mr. Baber, where are you employed?

A: ICI Americas, Incorporated, North Little Rock.

* * *

[page 7]

Q: What is your present position?

A: Quality control supervisor.

Q: What does that entail, what duties?

A: It entails quality control, quality assurance of finished products and raw materials, environmental coordination of air and water, and partial responsibility for industrial hygiene.

* * *

[page 48]

Q: All right. So let's talk about the March 5th meeting. Who attended?

A: Irvin Wheeler, myself, Mark Bradley, and Joe Williford.

* * *

[page 54]

Q: Did the company's ability to pay a fine -- was that ever a topic that came up?

A: No.

Q: What about any economic benefit that the company may have received as a result of the non-compliance or the delay in compliance? Was that ever discussed?

A: No.

* * *

[page 111]

Q: How many $500 fines have you paid?

A: Two that I know of.

Q: So that's an extra thousand from the original thousand?

A: Uh-huh.

Q: Who proposed the fine?

A: ADPC&E.

Q: Who at ADPC&E?

A: I'm assuming Randy Oberlag.

Q: How did he calculate that fine; do you know?

A: I have no knowledge of that.

Q: Did he request any information from the company that you're aware of to utilize in calculating the fine or the penalty?

A: No.

* * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ARKANSAS WILDLIFE FEDERATION Plaintiff,	)	
v.	)	No. LR-C-91-681
ICI AMERICAS, INC. Defendant.	)	

AFFIDAVIT OF STEVE A. WEAVER

STATE OF ARKANSAS)
) S.S.
COUNTY OF PULASKI)

I, Steve A. Weaver, do hereby depose and state:

1. I am the Chief Legal Counsel for the Arkansas Department of Pollution Control & Ecology ("PC&E" or "the Department"). I have been Chief Legal Counsel since October, 1988. I have been employed at PC&E since 1987. I have personal knowledge of the matters set forth herein.

* * *

5. Most enforcement actions taken by the Department are resolved through entry of a Consent Administrative Order ("CAO"). Generally, this entails the Department, through informal correspondence, notifying the alleged violator of the Department's grounds for enforcement action, proposing a compliance schedule, and often a civil penalty as well. If the alleged violator agrees to

the Department's proposed resolution, a CAO is entered, effective upon the date of its signing by the Director. No notice is given to the public of the proposed CAO, nor is there a public comment period, either before or after the entry of the CAO.

* * *

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on September 8th, 1992.

s/ Steve A. Weaver
Steve A. Weaver